

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 13, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP2380-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 2011CF50**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RICHARD J. SUGDEN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Reversed and cause remanded.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Richard Sugden appeals a judgment convicting him of theft of a tractor in Vernon County. He also appeals an order denying his motion for a new trial in which he argued that the circuit court erroneously

allowed evidence of theft of another tractor in Monroe County. The State argues that the Monroe County theft was admissible as other acts evidence to establish Sugden's knowledge that the Vernon County tractor was stolen. Because we conclude that the probative value of the evidence of the Monroe County theft was substantially outweighed by the danger of unfair prejudice and confusion of the issues, we reverse the judgment and order and remand the matter for a new trial.

### **BACKGROUND**

¶2 Sugden was charged with stealing a tractor belonging to Alexander Chambers and selling it to Michael Rice. The circuit court initially denied the State's pre-trial motion in limine to present evidence that Sugden stole and sold another tractor in Monroe County at around the same time. The court concluded that the Monroe County theft constituted impermissible propensity evidence. On reconsideration, the court granted the State's motion to introduce evidence of the Monroe County tractor theft, reasoning that it was similar to and intertwined with the Vernon County theft and would not unduly extend the trial. The court concluded that the proffered evidence would provide context and identify the thief because of the similarities in *modus operandi*.

¶3 At trial, four witnesses testified that they personally witnessed Sugden claim ownership of the tractor stolen in Vernon County when he sold it to Rice. Rice subsequently also bought the Monroe County tractor from Sugden. Rice drafted a bill of sale for both tractors, and Sugden signed it with a false name. The jury found Sugden guilty of the Vernon County tractor theft. Sugden appeals.

## DISCUSSION

¶4 To determine the admissibility of other acts evidence, courts must undertake a three-part analysis:

(1) Is the other acts evidence offered for an acceptable purpose under WIS. STAT. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?

(2) Is the other acts evidence relevant, considering the two facets of relevance set forth in WIS. STAT. § Rule 904.01?....

(3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *See* WIS. STAT. § (Rule) 904.03.

*State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998) (footnote omitted).

¶5 In his brief-in-chief on appeal, Sugden argues that evidence of the Monroe County tractor theft did not meet any of the three *Sullivan* prongs for the purpose of showing context and did not meet the third prong for showing identity. The State does not respond to that argument, in effect conceding the point. *See Charolais Breeding Ranches Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Rather, the State argues that evidence of the Monroe County theft was admissible to establish Sugden's knowledge that the tractor stolen in Vernon County was stolen property. We need not review the first two *Sullivan* prongs as they relate to Sugden's knowledge because we conclude that introduction of the Monroe County theft was substantially more prejudicial than probative of Sugden's knowledge as the case was presented to the jury.

¶6 When determining the probative value of other acts evidence, this court considers the relative importance or necessity of the evidence for the determination of guilt or innocence in a particular case. *See State v. Payano*, 2009 WI 86, ¶¶81, 85, 320 Wis. 2d 348, 768 N.W.2d 832. Here, the probative value of the Monroe County tractor theft, if any, was negligible. Sugden's knowledge of the Vernon County tractor theft was barely put at issue during the trial. Consequently, this evidence was not needed to establish Sugden's knowledge that the Vernon County tractor was stolen.

¶7 Other, less prejudicial evidence was available to prove knowledge. Chambers testified that he did not give anyone permission to take his tractor, and Sugden never claimed to have had Chambers' permission to take and sell the tractor. There is no evidence that Chambers and Sugden knew each other, so Sugden could not have misinterpreted some communication as consent to take the tractor. The tractor was taken from property that included a house, a small cabin and a gate, eliminating any possibility that the thief could have perceived the tractor as abandoned. There were signs of forced entry into the cabin, strongly suggesting lack of consent to take the tractor. Sugden sold the tractor worth approximately \$5000 for \$480, suggesting that he knew the tractor was stolen. Sugden lied about how he obtained the tractor and signed a false name to the sales receipt. Sugden's defense was that he was framed by Rice and his friends. In light of the State's strong evidence that Sugden knew the tractor was stolen and Sugden's defense which did not claim otherwise, evidence regarding the Monroe County tractor theft was not highly probative.

¶8 On the other hand, evidence of the Monroe County tractor theft was highly prejudicial. The danger of unfair prejudice arises from the prospect that it will distract the jury, subtly encourage jurors to infer that the defendant has a

propensity to commit such wrongs, and invite “punishment of the defendant because he is, for reasons other than the offense charged, a bad person.” *State v. Harris*, 123 Wis. 2d 231, 233-34, 365 N.W.2d 922 (Ct. App. 1985). This is especially true when, as in this case, the other acts evidence allegedly committed by the opposing party is similar to the act at issue in the case. *See Payano*, 320 Wis. 2d 348, ¶90 (“[U]nfair prejudice is most likely to occur ... when one party attempts to put into evidence other acts allegedly committed by the opposing party that are similar to the act at issue in the current case.”) The jury’s belief that Sugden committed the same crime at approximately the same time gave rise to these dangers without any corresponding necessity for the State to present other acts evidence.

¶9 The State argues that the court’s curative jury instruction reduced or removed any prejudice by preventing possible misuse of the evidence. However, the instruction told the jury it could use the other acts evidence on the issues of context and identity, positions the State has abandoned on appeal. The instruction did not address the question of Sugden’s knowledge that the tractor was stolen. We cannot conclude that the limiting instruction cured the prejudicial effect of the other acts evidence.

*By the Court.*—Judgment and order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

